IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 40 of 1985
In
COMPANY PETITION No. 18 of 1978
In
COMPANY APPLICATION No. 2003 of 1983
with
COMPANY APPLICATION No.122 of 1985
with
COMPANY APPLICATION No. 175 of 1988
with
COMPANY APPLICATION No. 106 of 1989
with
COMPANY APPLICATION No. 70 of 1993
with
COMPANY APPLICATION No. 131 of 1991
with
COMPANY APPLICATION No. 48 of 1998
with
COMPANY APPLICATION No. 45 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DIVYA VASUNDHARA FINANCIERS (P)LIMITED - Applicant(s)
Versus
SANJEEV BUILDERS PVT.LTD. & 4 - Respondent(s)

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Appearance :
MR SN SHELAT, Ld. Senior Advocate with MR RM DESAI, Ld. Advocate with MS KJ BRAHMBHATT, Ld. Advocate for DIVYA VASUNDHARA FINANCIERS (P)LIMITED in all matters.
None for Respondent(s) : 1 - 3.
MR PRANAV G. DESAI for the Respondents in COMA NOs. 40/85, 70/93, 131/91, 48/98 for the applicant in COMA NO.122/85, 106/89, 45/99.
MR SN SOPARKAR,Ld. Senior advocate for applicant in COMA No.175/88.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 14/12/2006

ORAL JUDGMENT

As all these company applications are interconnected between the same parties and with regard to one company, they are being disposed of by this common judgment.

2. Company Application No.40 of 1985 is filed by Divya Vasundhara Financiers Pvt. Ltd. (for short “the company”) for an appropriate order directing one Sanjiv Builders to hand over to the company the possession of the building, known as “H” building in the Divya Vasundhara Commerce Centre, Surat together with completion and occupation certificates issued by the Surat Municipal Corporation. It is further prayed to direct the said respondent to pay amount of installments, which has fallen due on 10-12-1984 and which would fall due on 10-3-1985 and subsequent installments which would fall due every quarter thereafter pursuant to agreement dated 26-11-1981 entered into between the company and the said Sanjiv Builders. It is further prayed to restrain the said Sanjiv Builders from dealing or parting with the possession of Flats/Shops and/or Offices situated in the said building.

It is also further prayed that if the said Sanjiv Builders does not pay the installments as per the agreement of sale dated 26-11-1981, in that case, to cancel the said agreement for sale and subsequently the said Sanjiv Builders be directed to hand over the possession of all the properties which are at present in the possession of Sanjiv Builders to the company.

Company Application No.122 of 1985 has been filed by the aforesaid Sanjiv Builders against the company to hold that the Court Committee is liable to pay to the said Sanjiv Builders a sum of Rs.1,75,00,000/- with interest by way of damages suffered by the applicant on account of various acts of commission/omission on the part of the Court Committee. It is also further prayed to hold that the Court Committee is liable to pay the applicant a sum of Rs.1,25,00,000/- on account of excess price realized from the various allotees of flats, shops and offices and to order the Court Committee to give appropriate credit to the applicant. It is also further prayed to direct the Court Committee to establish its titles as regards plot No.2885/B/1 and 2885/B/2 agreed to be sold to the applicant and to ensure that the possession of the applicant as regards the said two plots is vacant and peaceful and to order that on account of Court Committee's failure to do the same, the Court Committee

shall pay appropriate compensation to the applicant and to quantify the said compensation amount. Thus, so far as application No.40 of 1985 is concerned, the same is by the Committee for specific performance of the agreement to sale dated 26-11-1981. Similarly, Company Application No.122 of 1985 is by the Sanjiv Builders in whose favour the agreement to sale was executed, also for specific performance of the aforesaid agreement to sale dated 26-11-1981 and in failure to pay the compensation/damages. Thus, Company Application No.40 of 1985 and 122 of 1985 as such are the cross applications.

So far as Company Application No.175 of 1988 is concerned, the same is filed by the Sanjiv Builders against the Court Committee of the company for transfer of Special Civil Suit No.506 of 1988 filed by one M/s Mahesh Brothers against Sanjiv Builders and the Surat Municipal Corporation pending in the Court of learned Civil Judge (SD), Surat to this Court. It appears that the said suit has been filed by one M/s Mahesh Brothers for a declaration and permanent injunction restraining the Sanjiv Builders from constructing on certain part of the suit property which is forming part of the aforesaid agreement to sale dated 26-11-1981.

Company Application No/106 of 1989 is filed by the Sanjiv Builders for an appropriate order to withdraw

Regular Civil Suit No.437 of 1985 pending in the Court of learned Civil Judge (SD), Surat and to transfer the same to this Court under section 446 of the Companies Act, 1956. It appears that the said suit is filed by one Atul Madanlal Vakharia and others against Sanjiv Builders and others claiming to be the owners of land bearing survey Nos.2885/B/1 and 2885/B/2 which were agreed to sold to the Sanjiv Builders pursuant to the agreement to sale dated 26-11-1981.

Company Application No.70 of 1993 has been filed by the company against the Sanjiv Builders to direct the Sanjiv Builders to pay with running interest the balance amount as and when the same became due and payable by them and particularly on 7th, 8th, 9th and 10th installments, each of Rs.36,15,100/- which according to the company has become due and payable and it is also further prayed to cancel the agreement to sale executed on 26-11-1981 in favour of the Sanjiv Builders. Thus, Company Application No.70 of 1993 is filed for the same relief which are by and large sought in Company Application No.40 of 1985.

Company Application No.131 of 1991 has been filed by the company against Sanjiv Builders for necessary amendment in Company Application No.40 of 1985.

Company Application No.48 of 1998 has been filed by the company against the Sanjiv Builders to recall the

order dated 20th August 1982 in Company Application No.141 of 1982 passed by this Court as Sanjiv Builders has failed to perform its part of the obligations under the said order for more than fifteen years. It also appears that the said application is off-suit of Company Application No.40 of 1985.

Company Application No.45 of 1999 is filed by the Sanjiv Builders against the company for an appropriate order/declaration that the respondents have no right, title whatsoever in the properties which are agreed to be sold as per the agreement to sale dated 26-11-1981, more particularly properties known as Divya Vasundhara Commerce Centre. Thus, Company Application No.45 of 1999 is being filed on the basis of the agreement to sale dated 26-11-1981. Thus, the said company application is either off suit of Company Application No.122 of 1985 and/or for the similar relief which is sought in Company Application No.122 of 1985 and the said application also came to be said to be cross application of Company Application No.40 of 1985.

3. Few facts are necessary for the purpose of determination of all these applications. The company had floated saving scheme, housing finance scheme etc. and raised funds for its various projects by accepting

deposits and loan from the members of the public and by obtaining credit facilities from the banks. It appears that in April 1977, the company came in grip of financial crisis. The company proposed a scheme of arrangement by filing Company Application No.142 of 1977 before this Court under section 391 of the Companies Act, 1956. The said application was withdrawn and another application being Company Application No.179 of 1977 was filed proposing a modification in the scheme of arrangement. The said scheme was approved by the shareholders and other concerned persons. Thereafter, Company filed Company Petition No.18 of 1978 for obtaining Court's sanction to the proposed scheme of arrangement and by an order made on 25-12-1978 and 12/15-1-1979, this Court accorded sanction of the proposed scheme with certain modifications agreed upon by the concerned parties. The base of the said scheme was to ensure payment to all the creditors within a reasonable period; to complete and/or dispose of the outstanding incomplete projects and realize the dues; to sell the properties and liquidate the investments; to disburse the amount recovered from outright sale of certain properties as well as from various projects and from dues due to the company. For that purpose, a Managing Committee was constituted under the Chairmanship of Shri N.M. Miyabhai, ex Chief Justice

of this Court to do all that is necessary for implementing the scheme and to supervise the working of the company and to do all acts, deeds and things necessary or incidental to the implementation of the said scheme. The company was having certain projects in hand and the lands in the city of Surat bearing survey Nos.2157(Part), 2158 A/1/C (Part), 2156 A/1/D (Part), 2158 A/1/D (Part), 2885/B/1 (Part), 2885 B/2 and certain other lands, the particulars of which are given in the agreement to sale dated 26th November 1981 admeasuring about 21007 sq yard equivalent to 17564.58 sq mtr. By order dated 4-5-1981 passed by this Court in Company Application No.97 of 1980, the Committee was directed to invite tenders by advertisement in several newspapers for purchase of aforesaid properties. Pursuant to the said order dated 4-5-1981, the Court Committee invited tenders for purchase of the said property by inserting public notice in newspapers, pursuant to this notice, several offerers gave their offers for purchasing the said property. Thereafter, the Court committee took out a Company Application No.140 of 1981 and by order dated 30-9-1981/1-10-1981 and 6-10-1981 directed the Committee to sell the said properties in favour of the Sanjiv Builders Pvt. Ltd. for a total sum of Rs.3,61,51,000/- and to execute the agreement to sale as well as deed of

conveyance as may be necessary in that behalf on the terms and conditions specified in the said order dated 6-10-1981. It appears that certain properties were excluded from the sale. Accordingly, an agreement to sale came to be entered into between the company and the Sanjiv Builders Pvt. Ltd. dated 26-12-1981. The terms of payment as per the said agreement was as under:

1. The amount of Rs.5,00,000/- paid by the Vendees along with their offer to purchase the Surat property by way of EMD which amount has been credited as earnest money on the date of the order of the Court accepting the offer.
2. The Vendee shall pay 10% of the purchase price inclusive of the said earnest money of Rs.5 lacs on execution of the agreement for sale. The payment and receipt whereof the Vendor do hereby admit and acknowledge.
3. A further sum equivalent to 10% of the purchase price, will be paid within three months from 6-10-1981 being the date of the order of the Hon'ble Company Judge accepting the highest offer against which the possession of the property mentioned in para 10(a) of the Annexure A hereto will be handed over to the vendee.
4. A further sum equivalent to 10% of the purchase price

shall be paid within six months from the date of the payment as per Clause 3 above.

5. The balance of the purchase price of 70% shall be paid in seven equal quarterly installments the first of such installment shall be paid within three months from the date of payment mentioned in clause 4 above, and each of two subsequent installment to be paid within three months of the date of payment of the immediate proceeding installment.

It appears from the record that with respect to some of the properties out of the aforesaid agreement to sale, more particularly land bearing survey Nos.2885/B/1 and 2885/B/2, Regular Civil Suit No.437 of 1985 has been filed by one Atul Madanlal Vakharia in the Court of learned Civil Judge (SD), Surat. Thus, there is some dispute with regard to ownership and title of the aforesaid land bearing survey Nos.2885/B/1 and 2885/B/2. It appears that certain amounts came to be paid by said Sanjiv Builders. Out of the same and out of the other properties and pursuant to the various orders passed by this Court, all amount came to be paid to the creditors, depositors etc. Company Application No.48 of 1993 was filed by the Committee/Company permitting the company to borrow the funds without getting any charge on the assets of the company and to pay the amount which are

outstanding and by order dated 10-9-1993, the company was permitted to borrow the funds for settling the claims of unsecured creditors and depositors. The learned advocate appearing on behalf of the company also submitted that the depositors and unsecured creditors were paid 80% of the principal amount and by borrowing the funds, company proposed to pay not less than 40% to all the depositors and unsecured creditors. That after the permission was granted 90% of the depositors and creditors were paid and therefore, the learned Single Judge of this Court passed an order on 5-11-1993 to dissolve the Court Committee by directing the Court Committee to hand over the management of the company. The order dated 5-11-1993 passed in Company Application No.46 of 1993 reads as under:

> *"Pursuant to the order passed by this Court on 10-9-1993, most of the unsecured creditors have also been paid their dues. The Court Committee also confirms that 90% of the amount payable to depositors and creditors has been paid. Mr. B.R. Shah for the company further states that other depositors and creditors could not be paid as they have not come forward to claim their money. However, he stated that in order to protect their interest, the company has deposited Rs.20,00,000/- with State Bank of Saurashtra and it will ascertain a separate account for that purpose and will not withdraw any amount from the said account without prior permission of this Court. As I find that the Court Committee has now no role to play, it will not be proper to*

continue the Court Committee any more and, therefore, by this order, I dissolve the Court Committee and direct it to hand over management of the Company. The Court Committee shall complete the formalities of handing over management of Company by 11th November 1993."

4. It appears that against the order dated 10-9-1993 and 5-11-1993 passed in Company Application No.46 of 1993, whereby company was permitted to borrow loans and thereafter dissolving the Court Committee came to be challenged by way of OJ Appeal No.40 of 1993 and 39 of 1993 and both these appeals came to be dismissed by the Division Bench of this Court by order dated 9-3-2006. Thus, the order dated 5-11-1993 to dissolve the Court Committee and to hand over the management of the company came to be confirmed. It is also required to be noted that the learned Single Judge while dissolving the Court Committee also observed that the Court Committee has now no role to play as the unsecured creditors have been paid their dues. Thus, as on today, the scheme is fully implemented and the Court committee is dissolved. The aforesaid company applications are filed, more particularly Company Application No.40 of 1985 and 122 of 1985 are filed making allegations and counter allegations with regard to non performance of the terms and conditions of the agreement to sale as well as this Court's order by which the Court Committee was permitted

to sale the properties in favour of the Sanjiv Builders and both the respective applicants i.e. company as well as Sanjiv Builders have prayed for specific performance of the agreement to sale dated 26-11-1981 and Committee has prayed to direct the Sanjiv Builders to pay the amount due and payable as per the agreement to sale and the order passed by this Court and in alternative to cancel the agreement to sale and direct the Sanjiv Builders to hand over the possession of the properties in question which is handed over to them pursuant to the agreement to sale and the order passed by this Court. Similarly, the Sanjiv Builders have also prayed for an appropriate order directing the Court Committee to perform their obligations floating from the aforesaid agreement to sale and to hand over the possession of all the properties inclusive of survey Nos. 2885/B/1 and 2885/B/2.

5. Shri SN Shelat, learned senior advocate appearing for the company has vehemently submitted that so far as Company Application No.122 of 1985 filed by the Sanjiv Builders for specific performance of the agreement to sale executed between the parties and/or to implement the agreement to sale dated 26-11-1981 is concerned, there are serious disputed question of facts which are required

to be decided and considered only on leading the evidence by respective parties and on appreciation of evidence and therefore, the parties should be relegated to file the civil suit. He has also fairly conceded that the same can be fate of the Company Application No.40 of 1985 filed by the company by which the company has prayed for an appropriate order directing the Sanjiv Builders to make the payment as per the terms and conditions of the agreement to sale and in the alternative to cancel the said agreement to sale. He has also further submitted that even, otherwise, the scheme is fully implemented and the Court Committee has already been dissolved and as such no proceedings are pending before this Court and any dispute pertaining to implementation of the agreement to sale is beyond the scope and purview of section 392 of the Companies Act, 1956. He has also further submitted that there are allegations and counter allegations by the respective parties with regard to non performance and/or non fulfilling the terms and conditions of the agreement to sale by the respective parties. He has also further submitted that so far as some of the properties, more particularly, land bearing survey Nos.2885/B/1 and 2885/B/2, there is already a civil suit pending in the Court of learned Civil Judge (SD), Surat by way of Civil Suit No.437 of 1985 which has been filed by some third

party in which Sanjiv Builders as well as the company are parties and therefore, when the said suit is pending, the declaration as sought by the Sanjiv Builders with regard to the aforesaid lands also cannot be granted, otherwise, it will affect the pending suit before the learned trial Court. Shri Shelat has relied upon a decision of this Court in the case of very company i.e. the Court Committee, Divya Vasundhara Financiers Ltd. V. Kamlakar Narayan Samant and another reported in 1984 (56) Company Cases, page 487 and has submitted that under section 392 of the Companies Act, 1956 the Court has no power to adjudicate upon rights claimed by the company against third party. Therefore, it is requested to relegate the company as well as the said Sanjiv Builders, to approach the civil Court by way of filing substantive suit for establishment of their rights arising out of the aforesaid agreement to sale.

6. On the other hand, Shri Pranav G. Desai, learned advocate appearing on behalf of the Sanjiv Builders has submitted that when the agreement to sale has been executed pursuant to the scheme sanctioned by this Court, this Court would have supervisory jurisdiction to see that the scheme is properly implemented or not and therefore, and any dispute with regard to the

implementation of the scheme fully can be considered by this Court even after sanctioning of the scheme and therefore, it is requested to decide and disposed of the applications on merits and determine the rights between the parties. It has been submitted that when by agreement to sale dated 26-11-1981, the aforesaid properties inclusive of properties of land bearing survey Nos.2885/B/1 and 2885/B/2 were agreed to be sold, the company has to execute the sale deed and hand over the possession of the aforesaid plots also. It is submitted that there might be a disputed question of facts but if at this stage, the parties are relegated to file the suit, the question with regard to the limitation might arise and therefore, it is requested to entertain the present applications on merits. It has been submitted relying upon some of the clauses of the scheme that under the scheme, Divya Vasundhara Commerce Centre project was part and parcel of the scheme and the Committee was required to take appropriate steps for completion and development of the said project and when under the said scheme, the Committee executed the agreement to sale in favour of the Sanjiv Builders, it was the bounden duty of the Committee to fulfill all their obligations arising out of the aforesaid agreement to sale and to perform their duties under the said agreement to sale. Under the

circumstances, it is requested to grant the reliefs as prayed for.

7. Heard the learned advocates appearing on behalf of the parties.

8. It is now not in dispute that pursuant to the order passed by this Court dated 10-9-1993 and 5-11-1993 passed in Company Application No.46 of 1993, this Court has already dissolved the Court Committee and has passed the order to hand over the management of the company by observing that the Court Committee has now no role to play as the unsecured creditors have been paid their dues. Thus, as on today, the scheme is fully implemented and the Court Committee is dissolved. It is also required to be noted at this stage that the scheme which was sanctioned by this Court was to ensure payment to all the creditors within a reasonable period and for that purpose to complete and/or dispose of the outstanding incomplete projects and realize the dues; to sell the properties and liquidate the investments; to disburse the amount recovered from outright sale of certain properties as well as from various projects and from dues due to the company. Thus, having fulfilling the object for which the scheme was sanctioned and the scheme being fully

implemented, this Court has dissolved the Court Committee and has handed over the management to the company. So far as the disputes which have been raised in the present applications, more particularly, Company Application Nos.40 of 1985 and 122 of 1985 are with regard to alleged non-performance of the agreement to sale dated 26-11-1981 which was executed between the company and the Sanjiv Builders pursuant to the order passed by this Court with respect to Divya Vasundhara Commerce Centre project inclusive of land bearing survey Nos.2885/B/1 and 2885/B/2. There are allegations and counter allegations by the respective parties with regard to non-fulfilling the terms and conditions of the agreement to sale by the respective parties. It is the case on behalf of the company that the Sanjiv Builders have not made the full payment as per the terms and conditions of the agreement to sale and orders passed by this Court against which it is the allegation of the Sanjiv Builders that the company has failed to comply with the terms and conditions of the agreement to sale and there is a breach on the part of the company and therefore, they are entitled to damages as prayed for. Thus, basically both these applications are counter applications. By and large in both these applications, the prayer can be considered to be specific performance of the agreement to sale entered into between

the parties, may be pursuant to the order passed by this Court. Now as stated above, the Court Committee is already dissolved, the scheme is fully implemented, all the secured creditors are paid their dues and as observed by this Court, the Court Committee has no role to pay now.

9. As per the decision of this Court in the case of Divya Vasundhara Financiers Pvt. Ltd. (supra) while dealing with the scope of power of scope under section 392 with regard to arrangement or scheme, it is held by this Court that Court has no power to adjudicate upon rights claimed by the company against third party. It is held by this Court that power of the court under section 392(1)(b) of the Act is of wide amplitude, but it cannot be said that it is a power without any limitation. There is an inbuilt limitation on the power of the Court. The limitation is that it can be invoked only for the purpose of proper working of the compromise or arrangement. The power is a power of superintendence which is to be exercised by issuing appropriate directions or effecting necessary modifications so as to ensure the proper working of such compromise or arrangement. Now, considering the aforesaid judgment and the case on hand, there is a dispute between the company and Sanjiv

Builders with regard to non performance of their obligations under the agreement to sale. There are disputed questions of fact which are required to be decided on leading proper evidence and on appreciation of the same and the same is required to be done by the competent civil Court. This Court in a supervisory jurisdiction under section 392(1)(b) of the Act is not required to determine and adjudicate upon the rights of the parties which is required to be done only by the competent civil Court on leading proper evidence and on appreciation of evidence. More particularly in the facts and circumstances of the present case, as stated above, the Court Committee is already dissolved, scheme is fully implemented and by and large all the unsecured creditors are paid their dues under the scheme. Whether there is a breach of condition of agreement to sale by the company or by Sanjiv Builders, in the facts and circumstances of the case, it is required to be decided by the competent civil Court. It is required to be noted that with regard to parcel of land bearing survey Nos. 2885/B/1 and 2885/B/2, there is already a civil suit pending in the Court of learned Civil Judge (SD), Surat being Civil Suit No.437 of 1985 and there are other civil suits also pending with regard to some of the lands in question. It is true that agreement to sale was entered into pursuant

to the order passed by this Court while implementing the scheme sanctioned by this Court. However, when the scheme is fully implemented and the Court Committee is dissolved and there are disputed question of facts, the aforesaid disputes which are raised in the aforesaid company petition are not required to be decided by this Court and both the parties are to be relegated to file civil suit before the competent civil Court for establishing their rights and/or determining and/or adjudicating upon, who has committed breach of agreement to sale. The apprehension on the part of the learned advocate appearing for Sanjiv Builders is that a question might arise with regard to limitation. However, the learned senior advocate appearing for the company has submitted that the said apprehension is not well-founded, as this Court is relegating the parties to file civil suit and the time taken by the respective parties before this Court in the present proceedings can be excluded while considering the question of limitation. The learned counsel for the company has submitted that even, otherwise, they will not take any objection with regard to limitation.

10. Under the circumstances and considering the facts as stated above, more particularly, when the scheme is fully

implemented and the Court Committee is already dissolved and there are disputed question of facts and both the applications are counter applications and by and large it is for specific performance of the agreement to sale dated 26-11-1981 by and on behalf of the respective parties, both the company as well as Sanjiv Builders are relegated to file civil suits before the competent civil Court, Surat for the prayers which are sought in the aforesaid company applications, more particularly, Company Application Nos.40 of 1985 and 122 of 1985. If any question arises with regard to limitation, it is observed that both the parties will be entitled to plead and pray for exclusion of time taken by them before this Court to save the limitation and certainly they will be entitled to exclusion of the time taken by them before this Court in the present proceedings. As and when such suits are filed, the same shall be decided in accordance with law and on merits and it is observed that this Court has not expressed any opinion on merits in favour of either parties and by not deciding any question in these applications, it may not be construed that this Court has expressed any opinion on merits.

So far as other applications are concerned, in view of dismissal of Company Application Nos.40 of 1985 and 122 of 1985 and in view of the fact that they are

interconnected matters, they are also being disposed of. So far as prayers of the respective parties to transfer the suits are concerned, in view of the above, as no proceedings are pending before this Court, the scheme is fully implemented and the Court Committee is dissolved, let all the proceedings which are pending before the appropriate competent civil Court be decided in accordance with law and on merits and they are not required to be transferred to this Court.

11. With these, all these applications are disposed of. So far as an amount of Rs.10,000/- deposited by the company pursuant to the order passed by this Court is concerned, Office is directed to transmit an amount of Rs.5000/- to the Gujarat High Court Legal Aid Committee and Rs.5000/- to Gujarat High Court Advocates' Law Library by account payee cheque within a period of ten days from today.

(M.R.SHAH,J.)

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